89-1718

IN THE
SUPREME COURT OF THE UNITED STATES

EARL KEITH LINDELL,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

From the United States
Court of Appeals for the
Fifth Circuit

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THE QUESTION PRESENTED

The Petitioner submits that the use of the Allen Charge by the trial court constituted reversible error as it resulted in a denial of his Constitutional rights to due process and to a fair trial by an impartial jury.

THE PARTIES

The parties involved in this case are the Petitioner, EARL K. LINDELL, who is represented by his attorney, Richard V. Dymond, and the United States Attorney of the Eastern District of Texas and his staff. Other interested persons are the Personnel of the Drug Enforcement Administration of the United States, the United States Customs Service, the Texas Department of Public Safety, and the Jefferson, Chambers and Liberty Counties Sheriff's Departments in the State of Texas.

TABLE OF CONTENTS

AUTHORITIES

Page

REFERENCE TO OFFICIAL REPORT OF OPINION

A reprinted copy of the opinion of the United States Court of Appeals, Fifth Circuit, as it pertains to the sole issue presented, is appended at pages A-1 to A-17, inclusive, and is referenced by West Publishing Company as United States v. Lindell, 881 F.2d 1313 (5th Cir. 1989).

STATEMENT OF JURISDICTION

The basis of jurisdiction in this case is that the Petitioner was indicted and convicted of violations of federal criminal statutes.

This is a Petition for Writ of Certiorari following an order of the Fifth Circuit Court of Appeals dated August 17, 1989, affirming the Petitioner's conviction in the United States District Court for the Eastern District of Texas and the order denying rehearing of the case dated September 20, 1989.

STATEMENT OF THE CASE

The indictments of the Petitioner, Lindell, centered around the conspiracy to import marijuana, and the importation and distribution of same.

These indictments, handed down on March 7, 1987, in the Eastern District of Texas concerned a "control load" of marijuana which was imported from Central Americas at the direction of the Drug Enforcement Agency (DEA) and the U. S. Customs office with the assistance of the pilot services of the Petitioner who was operating in an undercover capacity. The indictments alleged that the Petitioner conspired to distribute eighty (80) pounds of marijuana which he allegedly kept for his own benefit from the controlled load.

It was apparent during the course

of the trial that the Government's case against the Petitioner was weak. Witnesses for the Government, it was realized and acknowledged, were the same individuals who had been implicated as smugglers by the Petitioner in his past cooperation with the DEA and Customs. The Government's key witness was the unindicted, self-confessed co-conspirator, William Carter, with whom it established was that the terms of his agreement/arrangement with the Government prosecutor would provide him with a motive to lie on the stand. During the Government's case in chief, at least one of the prosecution witnesses did not implicate the Petitioner in the criminal activity.

With the apparent drawbacks in the

Government's case, the Jury was faced with a very difficult task, and it is readily understandable that a unanimous decision was next to impossible to achieve without undue pressure and coercion by the Court.

Deliberation by the Jury began at around 8:45 a. m. on August 14, 1987, after approximately three (3) weeks of trial. Within three and one-half (3 1/2) hours, the Jury determined that it was deadlocked as was indicated in the note sent to the Judge. (15/3) The Jury was allowed to continue deliberating until 2:12 p. m. when another note was sent to the Judge advising that they were hopelessly deadlocked with no hope of unanimous decision. (15/5) At this point, the Trial Judge returned the Jury to the

courtroom and gave the Allen Charge. (15/7-9) After almost twenty (20) more minutes of deliberation, the Jury again returned a note advising of their "deadlocked" status. (15/11) At 3:57 p. m. the Judge repeated the previous charge to the Jury. (15/20-21) Again at 5:00 p. m. the Jury sent another note to the Judge reiterating their hopeless inability to reach a decision and that they were deadocked. (15/26) Of course, defense counsel made numerous motions for mistrials based on the notes sent from the Jury. (15/27) The Jury was recessed at 5:30 p. m. with instructions to return for more deliberation on the following Monday. (15/30-31)

After the Jury returned on Monday

morning, they deliberated all day until 5:00 with the exception of their lunch hour, and Tuesday morning, they were returned for continued deliberations. (16/3)

Finally late Tuesday morning, the Jurors that had been maintaining their opinion and beliefs for so long apparently yielded their position in the aparent understanding that they had to reach a decision prior to being released. They advised that they had reached a partial verdict, but that they were deadlocked as to the remainder of the charges and that further deliberations would be fruitless. (16/4)

The Petitioner was convicted of conspiracy to import marijuana, as well as two counts of importation and a Travel Act violation. He recieved a

fine of sixty thousand ($60,000.00) dollars and was sentenced to a term of twenty-five (25) years in a federal penitentiary.

The conviction was affirmed by order of the Fifth Circuit Court of Appeals on August 17, 1989, and the Petition for Rehearing was denied per curium on September 20, 1989.

ARGUMENT

The case at hand provides a prime example of the prejudicial effect of the use of the Allen Charge.

A verdict was ultimately reached after deliberations continued for two and one-half (2 1/2) days, and despite the Jury's contention on four (4) separate occasions that it was hopelessly deadlocked.

The substance of the Allen Charge used by the Court as well as the fact that it was used at several crucial points in the deliberation of the Jury served to coerce and prejudice the Jury. The effect was to force the Jury to reach a decision in the case merely as a means to end the trial.

The instruction given by the trial

judge in this case is as follows:

> "This is an important case. The trial has been expensive in time, effort and money, both to the Defense and to the Prosecution. If you should fail to agree upon a verdict, the case is left open and must be tried again. Obviously, another trial would serve only to increase the costs to both sides and there is no reason to believe that the case could be tried again by either side better or more exhaustively than it was tried by you ...
>
> If a substantial majority of your numbers are for a conviction, each dissenting Juror ought to consider whether a doubt in his or her own mind is a reasonable one since it appears to make no effective impression on the minds of the others.
>
> On the other hand, if a majority, or even lesser number of you are for acquittal, the other Jurors ought to seriously ask themselves again, and most thoughtfully, whether they do not have a reason to doubt the correctiveness of the judgment which is not shared by several of their Jurors and whether they should distrust the weight

> sufficiency of the evidence which fails to convince several of their Jurors beyond a reasonable doubt."( )

Although the use of a charge which urges the jury to reach a verdict was upheld in the 1896 case of Allen v. United States, 164 U. S. 492, 17 S.Ct. 154, 41 l. Ed. 528 (1896), from which this instruction receives it name, the modern judicial trend is against its use.

In United States v. Rey, 811 F.2d 1453 (11th Cir. 1987), Judge Edmondson addressed the coercive impact of the Allen charge on juries and the resulting violation of the defendant's due process rights. In his plea for a reconsideration of the use of the Allen charge by the full court in his circuit, Judge Edmondson noted that: three

Federal Circuit Courts have prohibited the use of the charge; four other Federal Circuit Courts have limited its use; eighteen states have rejected it; and he further stressed that the 1973 case of United States v. Bailey, 480 F. 2d 518 (5th Cir. 1973), in which the former Fifth Circuit Court sat en banc and upheld the use of the Allen charge, was a drastically split decision with seven dissenting judges advocating the prohibition of the Allen charge. 811 F.2d at 1459

The instruction given in the case at hand is almost identical to that in Rey, wherein the trial court instructed in part that:

> "the trial has been expensive in time, effort, money and emotional strain to both the

> defense and the prosecution... Obviously, another trial would only serve to increase the costs to both sides."

The Court in Rey found this first section of the instruction to be particularly improper in that the practical effect is to pressure the jurors in the minority to abandon their honestly held beliefs in response to a concern about the expense of the trial rather than considerations regarding the guilt or innocence of the accused. The trial court in Rey had further instructed that:

> "If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression upon the minds of the others.
>
> On the other hand, if a majority or even lessor number of

> you are in favor of an acquittal, the rest of you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt."

The wording in this second section also appears in the instruction used in the instant case. The Rey Court found this language to be both confusing and intimidating to individual jurors as it tends to remind them that the judge wants them to reach a verdict, and that their opinion should be reconsidered. Also noted was the obvious fact that the pressure to change positions will fall most heavily on the minority jurors. 811 F.2d at 1459.

The Court in Rey set forth the following very applicable words concerning the role of a jury in a criminal case:

"In some cases, the duty of a juror is rigorous. Deliberations can be long, hard and heated. It is each juror's duty to stand by his honestly held views; this can require courage and stamina. A majority of jurors eager to go home can exert tremendous pressure on a minority juror who is seriously trying to do his duty. The last thing such a minority holdout juror needs is for the trial judge--cloaked with the full authority of his office--to even hint that holding out will be futile in the long run and that a verdict could be reached if the holdout would just reconsider.

The jury trial system has not (emphasis added) malfunctioned when the jury cannot reach a verdict. One of the safeguards against the conviction of innocent persons built into our criminal justice system is that a jury may not be able to reach a unanimous verdict. Furthermore, a hung jury does not necessarily result in a retrial: one or both parties frequently change their view of the case so that a plea arrangement is reached or charges are dropped. Consequently, there is no necessity for judges to force a verdict.

As we see it, the Allen charge interferes with the jurors when they are performing their most important role: determining guilt

> or innocence in a close case. It unjustifiably increases the risk that an innocent person will be convicted as a result of the juror abandoning his honestly-held beliefs." 811 F.2d at 1460.

The Petitioner submits that the use of the Allen charge is a most serious violation of his Sixth Amendment right to a fair trial by an unbiased jury of his peers, and further, that the requirement of unanimity is diluted by the interjection of extraneous factors into the jury's consideration, such as consideraton of the majority viewpoint and economics of the added cost and time required to re-try the case.

In United States v. Fioravanti, 412 F.2d 407 (3rd Cir. 1969), the Court attacked the use of the Allen charge proclaiming that the use of this charge which directs jurors to re-examine

or distrust his judgment if he finds a majority taking a different view from his, will be deemed reversible error. The Court decided that in the Third Circuit, no verdict which may have been inflenced in any way by an Allen charge would stand. 412 F.2d at 420.

The Court in Fioravanti noted as did that in Rey, that there existed three possible decisions of a jury, that is, to find a defendant guilty, or not guilty, or return no verdict because of a lack of unanimity, and that each possibility is as much a part of the unanimity scheme of a jury as is the other. The Court further expounded on the point that an Allen charge is addressed toward the minority juror(s) requiring that he/she re-examine their views remarking that the Allen charge

sets forth a faulty major premise, which is that the majority is right and that the minority juror's opinion may lack rationality. 412 F.2d at 417.

The Court refers to this characteristic as the "very real treachery of the Allen Charge," noting that the purpose of the jury is illegitimized in that it becomes "some sort of a Gallup poll" to be conducted in the deliberation room rather than having the sole purpose of returning a verdict based on the evidence presented.

In further examination of the effect on the jury's unanimity, Judge Aldisert found that,

> "... [the Allen Charge] constitutes an unwarranted judicial invasion into the exclusive province of the jury and adds the blind imprimatur of the trial court to a matter of which it has

> to a matter of which it has absolutely no information: the results of the preliminary balloting in the jury room. To the product of this informal poll is added the gloss of trial judge approval." 412 F.2d at 417

In his opinion, he quoted a passage from State v. Voeckall, 69 Ariz. 145, 210 P.2d 972, 979, wherein Justice Udall illustrated the effect of an Allen charge on a jury by syllogizing as follows:

> "'The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did tell me not to surrender my conscientious convictions, he told me to doubt seriously the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will just have to change my vote.'"

Further noted, was the fact that the coercive effect undermines the give

and take of group deliberation which is the sole justifcation for the requirement that the verdict be unanimous.

Opposition to the use of the Allen charge must be noticed, especially within the Fifth Circuit from which the case at hand came. In 1973, the Fifth Circuit sat en banc to reconsider the use of the Allen Charge, and although it's use was upheld, the dissenting judges voiced strong oposition. United States v. Bailey, 480 F.2d 518 (5th Cir. 1973) In Bailey, Judge Goldberg, refered in his dissent to the Allen charge as "this abusable relic". In adopting and quoting much of the opinion set forth in Fioravanti, Judge Goldberg aptly pointed out the evils of the Allen charge and stressed that the Court

should use its supervisory powers to eliminate the use of the charge, not only in the interest of justice, but also in order to eliminate with it "an overly fertile source of appeals". He further stated that no future federal criminal convictions should stand in the Fifth Circuit where the charge does not strictly comply with the Standards recommended by the American Bar Association.

In response to many pleas to discontinue the use of such a coercive, improper, and unjust invasion into the decision making purpose of the jury through the use of a jury instruction, the American Bar Association has set forth guidelines for supplemental instructions which allow the avoidance

of the coercive impact of the Allen charge. These standards are as follows:

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b)If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement. ABA Standards Relating to Trial by Jury. Section 5.4

In addition to promulgating the standards for supplemental instructions as set forth above, the ABA has gone on to approve and recommend the following instruction:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that eachjuror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult withone ancther and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberation, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because

> of the opinion of your fellow jurors, or for the mere purpose of returning a verdict." Mathes, Jury Instructions and Forms for Federal Criminal Cases, Instruction 8.11, 27 FRD 39, 97-98 (1969).

Obviously, the arguements against the use of the Allen charge greatly outweigh those advocating the continued use of this instruction. Lower court decsions and state court decisions which are too numerous to mention and which are not binding on this Court should, however, be influential as these courts have used sound reasoning in their criticism and prohibition of the Allen charge.

In People v. Gainer, 566 P.2d 997 (Cal. 1977), the Court held the charge to be impermissible as inherently coercive in that it puts excessive pressure on the dissenting jurors to

acquiesce in the opinion of the majority. Because this pressure distorts the fact finding/evidence weighing process of the jury, the appellate court could not assume that the jury's verdict was truly an untainted assessment of the evidence. In effect, there would be a presumed coercive effect (emphasis added). The Court noted that the dissenting juror would be tempted to so acquiesce as he/she has been made the subject of a particular instruction. Further, no similar request is made of the majority.

The Court in Burnette v. State, 280 Md 88, 371 A.2d 663 (1977), made the same point while noting that the requests made in said instruction are inconsistant with the principal that no juror should be encouraged or required

to surrender his conscientious conviction in order to reach a verdict.

As recently as 1988, the Supreme Court of the United States considered the use of the Allen charge and allowed its use in Lowenfield v. Phelps, 484 U.S. --, 98 L.Ed.2d 568, 108 S.Ct. --, (1988), where the Allen charge was used in the second phase of a capital case.

Lowenfield differs from the case at hand in several respects. The instruction used in Lowenfield made no reference to the costs to society or the government of a new trial in the event of the jury's inability to render a verdict, and further, and most importantly, the instruction in Lowenfield did not require the minority jurors to distrust and re-think their

judgment. An additional factor considered by the Court in Lowenfield was the fact that the Defense counsel in Lowenfield made no objection to the giving of the instruction at the time it was given, indicating to this Court that the consideration of coercive effect was not apparent at the time of trial and may have been an afterthought.

Your Petitioner would show that in the case at hand, the attorney for the Petitioner did object numerous times to the giving of the Allen charge at each time it was given.

Additionally, a reconsideration of the Allen charge at its full effect is long overdue as is pointed out in numerous lower court decisions as well as in the dissenting opinion of Justices Marshall, Brennan, and Stevens, wherein

Justice Marshall provided a more detailed account of the procedure followed and objections made at the trial level of Lowenfield and concluded that the polling of the jury and the "...use of the Allen charge in this case created an unacceptable risk of jury coercion..." 98 L.Ed.2d at 588.

The Petitioner would further add that due to the fact that a minority holdout juror may well be one with a reasonable doubt as to the defendant's guilt, use of the Allen charge which undermines the validity of his opinion during deliberation, also undermines the test of proof. That is to say that if one or more of the jurors remain in doubt as to the guilt of the defendant, and is merely coerced into joining the

majority, then the prosecution has not convinced the jury beyond a reasonable doubt, but instead, the defendant is convicted unjustly, and his presumption of innocence is overcome by a jury instruction, rather than proof against him.

A jury's sole consideration must be a determination of the facts of the case. The decision to convict or acquit must be based on each individual juror's concern for the truth based on the evidence presented and not on their concern for the the additional burdens placed upon them by the Allen charge such as the majority opinion or the possible increased cost of a second trial.

While judicial economy is stressed often in the opinions upholding the use

of the Allen charge and is certainly a worthwhile goal, its use as a consideration or justification for the continued use of the Allen charge is misplaced and lacks logic due to the fact that any Allen-type instruction is going to be coercive to some degree even if modified, and this fact requires review on appeal on a case by case method until such time as the charge is prohibited.

The Petitioner would further submit that the use of the Allen charge is shocking to the conscience, and it has no place in the American Criminal Justice System.

CONCLUSION

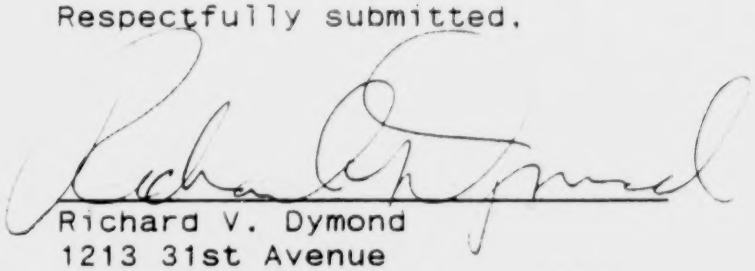
The Petitioner seeks a writ of certiorari for several reasons. All of which have been considered in state and federal courts all over this nation and have led to the rejection of the Allen charge in several Circuits and numerous state courts.

These courts have applied sound reasoning in prohibiting the use of the charge. All have stressed the exteme and unnecessary coercive impact that the use of the Allen charge has on a jury in a criminal case finding that the charge is harshly unfair and an obvious denial of the defendant his right to a fair trial by a jury of his peers. Certainly the trend against the use of the Allen charge in these courts

warrants a review and reconsideration of the full impact of the charge on our juries.

This Court should grant the Petition and issue the writ regarding the Petitioner's claim that the use of the Allen Charge is a violation of his right to a fair trial and a unanimous verdict by an impartial jury of his peers.

Respectfully submitted,



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APPENDIX

TABLE OF CONTENTS

LINDELL V. UNITED STATES

UNITED STATES of AMERICA,
Plaintiff-Appellee
v.
EARL KEITH LINDELL,
Defendant-Appellant,

United States of America
Plaintiff-Appellee
v.
Charles Roy McIntosh,
Defendant-Appellant,

United States of America
Plaintiff-Appellee
v.
William E. Kinnear, II,
Defendant-Appleeant

United States of America
Plaintiff-Appellee
v.
Danny M. Loken,
Defendant-Appellant

Nos. 87-2930, 87-6004, 876134, 87-6148.

United States Court of Appeals,
Fifth Circuit

August 17, 1989
Rehearing denied September 20, 1989

Defendants were convicted in the United States District Court for the Eastern District of Texas, Howard Cobb, J., of various narcotics offenses, and they appealed. The Court of Appeals, Duhe, Circuit Judge, held that: (3) giving of Allen charge was not abuse of discretion.

Affirmed.

10. **Criminal Law** [Key No. 865(1.5)]

Giving modified Allen charge rather than declaring mistrial after receiving two notes from jury indicating they were hopelessly deadlocked was not abuse of discretion in prosecution for conspiring to import and distribute marijuana, in light of three week trial on numerous

counts against defendants in context of sophisticated drug importation scheme. Comprhensive Drug Abuse Prevention and Control Act of 1970, Sections 406, 1013, 21 U.S.C.A. 846, 963.

Appeals from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, JOHNSON, and DUHE, Circuit Judges.

DUHE, Circuit Judge:

FACTS AND PROCEDURAL HISTORY

Appellants Earl Keith Lindell, Danny M. Loken, Wlliam E. Kinnear, and Charles Roy McIntosh were charged with others in a 35-count indictment for various crimes stemming from a marijuana

importation scheme involving several loads of marijuana brought into the United States from 1982 to 1985. In July 1982, Lindell was planning a "controlled" airplane flight bringing drugs into this country in support of an ongoing drug investigation at the direction of the Drug Enforcement Administration ("DEA") and customs officer David Harrison. Prior to the flight, William Carter, an informant working for Harrison, was introduced to Lindell. The sonspiracy was born when they agreed to set up a marijuana smuggling operation.

The following chronology summarizes the major events that the government alleged comrised the conspiracy:

> October 1982: Lindell flies in the "control" load for the DEA. He and Carter keep eighty pounds of this

marijuana for their own distribution.(1)
March 1983: Lindell, Carter, and Harrison(2) team up for the importation of thesecond load from Mexico. Kinnear helps distribute this load.(3)
June 1983: In order to plan future loads Lindell and Carter travel to Belize, Central America, and have discussions with two marijuana suppliers, Badner Hassan and Isaac Dyck.(4)
June/July 1983: The third load is imported from Belize by Lindell, Carter, and Hassan. Loken, Lindell and Kinnear distribute this load.(5)
November 1983: The fourth load is imported, and is distributed by Lindell, Lolen, McDaniel.(6)
March 1984: The fifth load is imported. Carter, Lindell, and Loken plan this load, and Kinnear helps distribute it.(7)
October 1984: Carter travels to Belize to arrang another marijuana purchase from Badner Hassan and Isaac Dyck. After their meeting, Dyck called Carter to inform him that someone would be sent to collect money for next load.
December 1984: Dyck sends McIntosh to Beaumont, Texas, to collect the money owed for the impending load. While in beaumont, he stays at the Best Western Motel. Carter spoke to McIntosh on several occasions and went to see him at the motel.

The load arrived on December 3, 1984.(8) Carter was arrested leaving the airfield after marijuana was loaded onto his truck. After the arrest, McDaniel and William Paul Tinsley(9) went to the Best Western for discussions with McIntosn concerning the load and Carter's arrest.

At trial, the government's key witness was William Carter. After his arrest in December 1984 he entered into a plea agreement in exchange for his testimony against the defendants.

Apellants appeal their convictions on various grounds. Finding no error, we affirm.

ISSUES ON APPEAL

III. ALLEN CHARGE

[10] Appellants contend that the trial court's use of the Allen charge contributed to a coerced verdict.(11) The standard of review is abuse of

discretion. United States v. Nichols, 750 F.2d 1260, 1266 (5th Cir. 1985). This Court must scrutinize the Allen charge for compliance with two requirements: "(1) the semantic deviation from approved 'Allen' charges cannot be so prejudicial to the defendant as to required reversal, and (2) the circumstances surrounding the giving of an approved 'Allen' charge must not be coercive." United States v. Bottom, 638 F. 2d 781, 787 (5th Cir. 1981) (citing United States v. Bailey, 468 F.2d 652 (5th Cir. 1972), aff'd en banc. 480 F.2d 518 (5th Cir. 1973)).

The charge used by the trial court meets the first criteria; it comports with modified Allen charge language repeatedly approved by the Court.(12) See, e.g., United States v. Kelly, 783

F.2d 575,576-577 (5th Cir.), cert. denied, 479 U.S. 889, 107 S.Ct. 288, 93 L.Ed.2d 262 (1986); United States v. Anderton, 679 F.2d 1199, 1203 n. 3 (5th Cir. 1982); United States v. Bottom, 638 F.2d at 786.

In evaluating the "totality of the circumstances" surrounding the use of the charge, we proceed on a case by case basis. United States v. Fossler, 597 F.2d 478, 485 (5th Cir. 1979). In this case, the jury retired to deliberate on a Friday morning. At 12:25 p.m., the jury sent the court note number one(13) stating they were "deadlocked." At 2:12 p.m., the jury sent note number two stating that "[w]e are hopelessly deadlocked with no hope of unamimous decision." At 2:30 p.m., the court gave

the jury the modified Allen charge. At 2:58 p.m., the jury sent note number three stating that "due to very strong personal convictions we are still hopelessly deadlocked. No hope of a unanimous decision." At 3:57 p.m., the court instructed the jury to review all of its instructions and continue to deliberate. At 5:00 p.m., the jury sent note number four stating that there was "no hope!" they were subsequently excused for the weekend.

The jury returned on Monday morning and continued to deliberate until 11:28 a.m. on Tuesday, when they sent a note stating that "even though we do not have unanimous decisions on all counts, we are at a point where any further deliberation woud be completely fruitless." The trial court did not

require any further deliberations and accepted a partial verdict on Tuesday afternoon. The jury returned 14 guilty verdicts, nine not guilty verdicts, and was deadlocked on 11 counts. During deliberations, repeated motions were made by the appellants for a mistrial.

We find that the trial court's use of the Allen charge was reasonable under the circumstances. In light of the three week trial and the numerous counts against the defendants in the context of a sophisticated drug importation scheme, the trial court was within the bounds of its discretion in refusing to declare a mistrial after receiving the deadlock notes on the first day of deliberations. See United States v. Garcia, 732 F.2d 1221, 1227 (5th Cir.

1984 Allen charge given after second deadlock note on first day of deliberation, guilty verdict returned on same afternoon.

Other circumstances surrounding the verdict lead us to conclude that the jury was not coerced: 1 after resuming deliberations on Monday, there were no more deadlock notes prior to the partial verdict; 2 the verdict was a discriminating one, see United States v. Foster, ... F.2d at ..., 984 5th Cir. 1983, cert. denied, 466 U.S. 1103, 104 S.Ct. 1062, 80 L.Ed.2d 132 1984; 3 the trial judge did not inquire into numerical division of the jury, Brasfield v. United States, 272 U.S. 448, 449-50, 47 S.Ct. 135, 136, 71 L.Ed. 345 1926; 4 no deadline was set for the jury's decision; and 5 the verdict

was returned two days after the Allen charge was given. See United States v. Bottom, 638 F.2d at 788 (three hour time span between Allen charge and verdict was not unduly short).

FOOTNOTES:

(11) The term "Allen charge" is used in reference to supplemental instructions urging a jury to forego their differences and come to a unanimous decision.

(12) The Allen charge given is found in the Fifth Circuit Pattern Jury Instructions for Criminal Cases (1979).

We decline the appellants' suggestions to follow the "modern judicial trend curtailing the use of the Allen charge." See, e.g., United States v. Rey, 811 F.2d 1453, 1458 (11th Cir.), cert denied, 484 U.S. 830, 108 S.Ct. 103, 98 L.Ed.2d 64 (1987). Even if we were inclined to do so, unless sitting en banc we are bound by this Court's repeated approval of the sue of the modified Allen charge.

(13) In addition to the notes sent pertinent to this discussion, the jury sent other notes throughout their deliberations concerning evidentiary items.

(14) The discriminating verdict demonstrates the appellants misplaced reliance on United States v. Arpan, 861

F.2d 1073 (8th Cir. 1988), reh'g en banc granted, 867 F.2d 1188, (1989). Since the rehearing en banc has been granted, the panel opinion is vacated and of dubious precedential value. Nevertheless, it is distinguishable. In Arpan, the Court found that the verdict was coerced. In response to notes inquiring as to what it should do if it cannot reach a unanimous decision, the trial court twice instructed the jury that a verdict may not be returned as to any count in the indictment unless it was unanimous. Id. at 1075-77. The jury subsequently reached a verdict on all eight counts of the indictment. Finding that this sort of jury instruction impersmissibly precluded the "option of a hung jury," the convictions were overturned. Id. at 1077. No such complaint can be made here. In the 34 count indictment, the jury was deadlocked on 11 counts.

CONCLUSION

The judgment of the district is AFFIRMED.

UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 87-2930

D.C. Docket No. B 87-0008-02-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EARL KEITH LINDELL,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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Before GOLDBERG, JOHNSON and DUHE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

August 17, 1989

Gilbert F. Ganucheau, Clerk
U.S. Court of Appeals, Fifth Circuit
By: /S/ P. Keller
Deputy

ISSUED AS MANDATE: October 2, 1989

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 87-2930, 87-6004, 87-6134
& 87-6148

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EARL KEITH LINDELL,
Defendant-Appellant,

****

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES ROY MCINTOSH,
Defendant-Appellant,

****

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM E. KINNEAR, II,
Defendant-Appellant,

****

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DANNY M. LOKEN,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

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ON PETITIONS FOR REHEARING

(SEPTEMBER 20, 1989)

Before GOLDBERG, JOHNSON, and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/S/ John M. Duhe', J.
United States Circuit Judge